UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION	MDL. No. 1456 CIVIL ACTION: 01-CV-12257-PBS Judge Patti B. Saris
THIS DOCUMENT RELATES TO ALL ACTIONS	

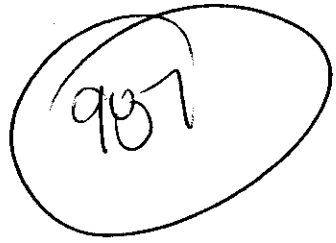
MOTION TO ADD B. BRAUN MEDICAL, INC. AS A DEFENDANT

FILED UNDER SEAL

Plaintiffs, by their attorneys, respectfully request that this Court enter an order adding B. Braun Medical, Inc. ("BBM") as defendant in this action. In support thereof, plaintiffs state as follows:

1. On September 6, 2002, plaintiffs filed the Master Consolidated Complaint ("MCC"), naming BBM as a defendant. On May 13, 2003 this Court dismissed BBM as a party without prejudice. On December 5, 2003, plaintiffs filed the Amended Master Consolidated Complaint ("AMCC") and named B. Braun of America, Inc. ("BBA") as a defendant. BBA is the parent corporation of BBM. In the AMCC, BBM was inadvertently omitted as a defendant.

2. While, as set forth in their contemporaneously-filed Supplement to their opposition to BBA's motion to dismiss the AMCC ("Supplement"), plaintiffs believe that BBA is a proper party to this litigation, during the recent deposition of BBA's 30(b)(6) designee, it



became clear that BBM is a proper party to this litigation as well. Namely, BBM manufactures at least some of the AWPIDs in the AMCC.[1] Ex.1 (Codrea Tr., at 50:4-14).

3. Rule 21 of the Federal Rules of Civil Procedure provides in pertinent part:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Fed. R. Civ. P. 21. It is well settled in this District that "[a] party may resort to Rule 21 to add a party who for some innocent reason has not been made a party to the action and whose presence is necessary or desirable." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 340, 344 (D. Mass. 1993).

4. In addition, Rule 15 of the Federal Rules of Civil Procedure provides that a party may be added by an amendment that relates back to the original pleading, where:

> the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

See Federal Rule of Civil Procedure 15(c)(3). Moreover, under the judicially-created identity-of-interest doctrine, "a new party may be added 'when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced.'" *Moses v. Joint Frost, M/V*, C.A. No.

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[1] As defined in Plaintiffs' Amended First Request for Production of Documents to Astrazeneca, Aventis, Dey, Fujisawa, Abbott, Baxter, Boehringer, Braun, BMS, GSK, Immunex, Pharmacia, Schering-Plough and Watson dated June 19, 2003, AWPID is defined as "AWP Inflated Drugs," and describes the drugs set forth in Appendix A of the AMCC. *See* Ex. 2 (Plaintiffs' Amended First Request for Production of Documents to Astrazeneca, Aventis, Dey, Fujisawa, Abbott, Baxter, Boehringer, Braun, BMS, GSK, Immunex, Pharmacia, Schering-Plough and Watson, at 3).

91-11247-WF, 1993 U.S. Dist. LEXIS 5678, at *4 (D. Mass. Apr. 21, 1993) (Wolf, J.) (quoting *Jimenez v. Toledo*, 604 F.2d 99, 102 (1st Cir. 1979)) (holding doctrine was satisfied where original party was alleged to have been "owned, operated, and controlled" by added party).[2] "The substitution of such [identity-of-interest] parties . . . is not significant when the change is merely formal and in no way alters the known facts and issues on which the action is based." *Young v. Lepone*, 305 F.3d 1, 15 (1st Cir. 2002) (citations omitted).

5. As explained more fully in plaintiffs' Supplement, the AMCC allegations against BBA are substantially similar to the MCC allegations against BBM. Moreover, because of the closely intertwined relationship between BBA and BBM, and the fact that BBM was named in the MCC, BBM should have had notice of the claims in the AMCC. Indeed, BBA's 30(b)(6) designee (also BBM's Assistant General Counsel, Assistant Secretary, and Corporate Compliance Officer, *see* Ex. 1 (Codrea Tr., at 7:8-20)), stated that some of the drugs at issue in this litigation were manufactured by BBM and therefore, as an officer of both BBA and BBM, knew that BBM was one of the proper B. Braun parties to this litigation. Therefore, BBM should have known that this action would be brought against it and will suffer no prejudice by being added. Accordingly, pursuant to Rules 15 and 21, BBM should be added as a proper defendant.

WHEREFORE, for the reasons more fully set forth in plaintiffs' Supplement, plaintiffs respectfully seek leave to amend its complaint to add B. Braun Medical, Inc. as a defendant and relate the amendment back to the filing of the AMCC, and all other relief that this Court deems just and proper.

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[2] For the Court's convenience, plaintiffs have provided a copy of this unreported decision in an attached Appendix.

DATED this 24th day of August 2004.

By: Steve B. Berman (HM)

Thomas M. Sobol (BBO # 471770)
Edward Notargiacomo (BBO #567636)
Hagens Berman LLP
One Main Street, 4th Floor
Cambridge, MA 02142
Telephone: (617) 482-3700
Facsimile: (617) 482-3003

LIAISON COUNSEL

Steve W. Berman
Sean R. Matt
Hagens Berman LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594

Samuel Heins
Brian Williams
Heins Mills & Olson, P.L.C.
3550 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 338-4605
Facsimile: (612) 338-4692

Jeff Kodroff
John Macoretta
Spector, Roseman & Kodroff, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300
Facsimile: (215) 496-6611

CHAIRS OF LEAD COUNSEL COMMITTEE

Marc H. Edelson
Alan Hoffman
Hoffman & Edelson
45 West Court Street
Doylestown, PA 18901
Telephone: (215) 230-8043
Facsimile: (215) 230-8735

Kenneth A. Wexler
Elizabeth Fegan Hartweg
The Wexler Firm LLP
One North LaSalle Street, Suite 2000
Chicago, IL 60602
Telephone: (312) 346-2222
Facsimile: (312) 346-0022

MEMBERS OF LEAD COUNSEL COMMITTEE AND EXECUTIVE COMMITTEE

Michael McShane
Alexander, Hawes & Audet, LLP
300 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 982-1886
Facsimile: (415) 576-1776

Robert E. Piper, Jr.
Piper & Associates
624 Pierre Avenue
Shreveport, LA 71103
Telephone: (318) 226-0826
Facsimile: (318) 424-9900

MEMBERS OF EXECUTIVE COMMITTEE

Anthony Bolognese
Bolognese & Associates
One Penn Center
1617 JFK Boulevard, Suite 650
Philadelphia, PA 19103
Tel: (215) 814-6750
Fax: (215) 814-6764

Jonathan W. Cuneo
The Cuneo Law Group
317 Massachusetts Avenue, N.E.
Suite 300
Washington, D.C. 20002
Tel: (202) 789-3960
Fax: (202) 789-1813

Neal Goldstein (Of Counsel)
Freedman & Lorry, PC
400 Market Street, Suit 900
Philadelphia, PA 19106
Tel: (215) 925-8400
Fax: (215) 925-7516

Michael E. Criden
Hanzman & Criden, PA
Commerce Bank Center, Suite 400
220 Alhambra Circle
Coral Gables, FL 33134
Tel: (305) 357-9000
Fax: (305) 357-9050

Blake M. Harper
Kirk B. Hulett
Hulett Harper LLP
550 West C Street, Suite 1700
San Diego, CA 92101
Tel: (619) 338-1133
Fax: (619) 338-1139

Jonathan D. Karmel
Karmel & Gilden
221 N. LaSalle Street
Suite 1414
Chicago, IL 60601
Tel: (312) 641-2910
Fax: (312) 641-0781

Dianne M. Nast
Roda & Nast, PC
801 Estelle Drive
Lancaster, PA 17601
Tel: (717) 892-3000
Fax: (717) 892-1200

Henry H. Rossbacher
Rossbacher & Associates
811 Wilshire Boulevard,
Suite 1650
Los Angeles, CA 90017-2666
Tel: (213) 895-6500
Fax: (213) 895-6161

Jonathan Shub
Sheller, Ludwig & Badey, P.C.
1528 Walnut Street, 3rd fl
Philadelphia, PA 19102
Tel: (215) 790-7300
Fax: (215) 546-0942

Scott R. Shepherd
Shepherd & Finkleman, LLC
117 Gayley Street, Suite 200
Media, PA 19063
Tel: (610) 891-9880
Fax: (610) 891-9883

Lisa J. Rodriguez
Ira Neil Richards
Trujillo Rodriguez& Richards, LLC
The Penthouse
226 West Rittenhouse Square
Philadelphia, PA 19103
Tel: (215) 731-9004
Fax: (215) 731-9044

Mitchell A. Toups
Weller, Green, Toups & Terrell, L.L.P.
2615 Calder Street, Suite 400
P.O. Box 350
Beaumont, TX 77704
Tel: (409) 838-0101
Fax: 409-838-6780

Damon Young
Lance Lee
Young, Pickett & Lee
4122 Texas Boulevard
P.O. Box 1897
Texarkana, AR/TX 75504
Tel: (903) 794-1303
Fax: 903-792-5098; 903-794-5098

ADDITIONAL ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

Docket No. MDL 1456

I, Steve W. Berman, hereby certify that I am one of plaintiffs' attorneys and that, on August 24, 2004, I caused copies of MOTION TO ADD B. BRAUN MEDICAL, INC. AS A DEFENDANT to be served by facsimile and Federal Express on:

Daniel F. Attridge
Kirkland & Ellis, LLP
655 Fifteenth Street, NW
Washington, DC 20005
Facsimile: (202) 879-5200

Dated: August 24, 2004

Steve Berman

Steve W. Berman